Software Rights Archive, LLC v. Google Inc. et al

Doc. 176 Att. 6

EXHIBIT 21

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UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

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COPY

THE APPLE iPOD iTUNES ANTI-TRUST LITIGATION, ______________________________/

No. C-050037-JW(RS)

DEPOSITION OF ROGER G. NOLL, Ph.D.

Taken before EARLY K. LANGLEY, RPR, RMR

CSR No. 3537

September 19, 2008

Aiken Welch COURT REPORTERS

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DEPOSITION OF ROGER G. NOLL, Ph.D.

BE IT REMEMBERED, that pursuant to Notice, and on the 19th day of September 2008, commencing at the hour of 10:10 a.m., in the offices of Jones Day, 555 California 26th Floor, San Francisco, California, before me, EARLY K. LANGLEY, a Certified Shorthand Reporter, personally appeared ROGER G. NOLL, Ph.D., produced as a witness in said action, and being by me first duly sworn, was thereupon examined as a witness in said cause.

---oOo---

BONNY E. SWEENEY, PAULA ROACH, Coughlin Stoia Geller Rudman & Robbins LLP, 655 West Broadway, Suite 1900, San Diego, California 92101, appeared on behalf of the Purchasers Plaintiffs.

HELEN I. ZELDES, Zeldes & Haeggquist, LLP, 655 West Broadway, Suite 1410, San Diego, California 92101, appeared on behalf of the Indirect Purchaser Plaintiffs.

ROBERT A. MITTELSTAEDT, MICHAEL SCOTT, Jones Day, 555 California Street, 26th Floor, San Francisco, California, 94104, appeared on behalf of the Defendant Apple, Inc.

ALSO PRESENT: Carlyn Clause.

Nick Silva, Videographer, Aiken & Welch Court Reporters and Video, One Kaiser Plaza, Fifth Floor, Oakland, California 94612.

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PROCEEDINGS

--oOo--

THE VIDEOGRAPHER: Stand by. On the record. 10:09

My name is Nick Silva. I'm a qualified video technician and a notary public for the County of Alameda, State of California.

I'm videotaping on behalf of Aiken & Welch Court Reporters at One Kaiser Plaza, Fifth Floor, 10:09 in Oakland, California 94612. Today's date is September 19th, 2008, and the present time is 10:10. The location of this deposition is the Jones Day law firm at 555 California Street, 26th Floor, San Francisco, California 94101. 10:10

Today's witness is Roger G. Noll in the case of Apple, Inc., versus the Apple iPod iTune Anti-Trust Litigation, case no. C-05-00037-JW(RS), filed in the United States District Court, Northern District of California, San Jose 10:10 Division.

This deposition was noticed by a Robert A. Mittelstaedt for the defendants.

Would the counsel for the parties please identify themselves and for whom they are 10:10

appearing.

MS. SWEENEY: Bonny Sweeney from the Coughlin Stoia law firm representing the direct purchaser plaintiffs.

MS. ROACH: Paula Roach from Coughlin Stoia representing plaintiffs. 10:10

MS. ZELDES: Helen Zeldes from Zeldes & Haeggquist representing the indirect purchaser plaintiffs.

MR. MITTELSTAEDT: And Bob Mittelstaedt for the defendant with Jeff LeVee, Michael Scott and Carlyn Clause. 10:10

THE VIDEOGRAPHER: Would the counsel please state any stipulations or statements that they would like on the record at this time. 10:11

MR. MITTELSTAEDT: None.

THE VIDEOGRAPHER: The reporter may now swear the witness.

ROGER NOLL, Ph.D.

sworn as a witness,

testified as follows:

EXAMINATION BY MR. MITTELSTAEDT:

Q. Good morning. If you would state your name and business address, please.

A. My name is Roger G. Noll and I'm in the 10:11

Q. What was the discussion?
A. It was very brief. She said, "I'm going to go buy an iPod," and then she -- I said, "Fine. Go buy an iPod."
Q. Did she give you any reason why she wanted to buy an iPod? 10:13
A. No.
Q. Do you know if she shopped around for competing devices?
A. I think -- I think she considered a portable CD player, but I don't know how seriously. I don't know whether she shopped for it. 10:13
Q. Do you know if she considered any other portable digital music players, MP3 players? 10:14
A. I can't say for certain. I don't know. Because I wasn't -- I wasn't part of the search process.
Q. Okay. Do you know whether your wife has any -- has ever bought any music from Apple's iTune's music store? 10:14
A. Yes, I know whether she has.
Q. And what's the answer?
A. The answer is no.
Q. Okay. Do you have any information about 10:14

Q. And at what point did you think this case, as it was described to you, sounded a lot like Microsoft?
A. Instantaneously.
Q. And what was it about the description of this case that led you to that initial reaction? 10:20
A. We were talking about the tying aspect of it, and that's what sounded like it was -- had a similarity to tying middleware to operating systems that were parts of numerous complaints against Microsoft. 10:20
Q. Do you have any information one way or another whether a consumer can play music from the iTune store on any portable digital player other than iPod? 10:21
A. Well, I'm -- yeah, I'm aware precisely what their limitations are. I mean, if you -- the mechanism is to either do an actual or virtual burn of the CD and then replay it.
Q. And in that way, music can be played from the iTunes store on portable players other than an iPod; correct? 10:21
A. If you go through that set of procedures, yes. Just like you could always use Netscape, even though Internet Explorer was the default

Q. Okay. And what is the "it" there when you say it shifted --
A. The fact that there was a differential ease of access that it was substantial between iPods and competing portable digital media players. 10:28
Q. Okay. And that differential ease of access is the two extra steps, burning and ripping; correct?
A. The issue with -- yes. The issue is the question -- the core question is whether that is substantial enough to -- to be the equivalent of a small but significant nontransitory increase in price. That is to say, does it impose a cost that is sufficient so that it affects peoples' decisions about which portable digital media player to buy. 10:28 10:29
Q. Okay. And, again, the "it" in that answer is the two extra steps to get music from Apple's music store to a competing player as opposed to an iPod; is that correct? 10:29
A. There's that aspect to it, plus there's also a potential issue about the quality of reproduction arising from undertaking those steps.
Q. Okay. Do you hold the view that that type 10:29

prepare your report and to complete your assignment?

A. I would have liked to have much more discovery information. But given the amount of information I had, I didn't feel pressed for time. 10:41

Q. All right. Is there any place where you think your report is particularly vulnerable or questionable or where you're out on a limb?

A. Not at all. Seems to me this is a fairly straightforward class certification case. And 10:41 it's not anywhere near as complex as some other class certification cases I've been involved in.

Q. And if your students submitted your report to you as an exam, you'd give it an A-plus?

A. That's a very hard thing to say because I 10:41 have a -- this is my child. I have a certain affection for the way I say things. So I'm not sure I'm an objective grader of my own reports. But I -- I don't have any -- I'm not -- there's nothing in it that I feel uneasy about. 10:42

Q. What do you think would be the strongest defense for Apple in this case on the merits?

MS. SWEENEY: Objection to the extent that it calls for a legal conclusion.

THE WITNESS: Well, I'm talking -- this is 10:42

a report about class certification. So the issue would be how -- what could Apple do or say to undermine the idea that the class should be certified. But that's the only issue that I've thought about.

I mean, I'm -- haven't reached a conclusion on whether Apple actually did engage in anticompetitive behavior that requires remedy in a court. So all I've thought about is whether the case is legitimately a class. 10:42

And so in that sense, the -- I don't have information about how the wholesale market works because that wasn't discovered. And so, you know, I suspect you can probably find an economist who will say that something along the lines of 10:43 everybody in the wholesale market engages in individual negotiations, there's no such thing as a list price, and there is no systematic way to represent the pricing process in a formula.

That's my prediction about what's going to 10:43 happen with regard to class certification, but I don't know that that's true because it depends on what the information is.

I mean, you have a huge advantage because you've prevented me from looking at the data, but 10:43

you will undoubtedly give that data to your expert. And so what I'll be confronted with is an expert report that has much more information than I do and I'll have a few weeks to respond to it. So that'll be interesting. 10:43

BY MR. MITTELSTAEDT:

Q. You have spent some time thinking about the merits of this case; correct?

A. I've spent some time thinking about it, but I don't have a conclusion about the merits. 10:44

Q. You haven't formed an opinion one way or another as to whether the alleged conduct by Apple is anticompetitive; is that correct?

A. I do not have a conclusion as to whether Apple is liable for an antitrust violation, with 10:44 respect to its behavior. But in order to have -- reach a conclusion, you have to do the things that were outlined in my report.

Q. I used the word "anticompetitive." You used the term "antitrust violation." 10:44

A. Yes.

Q. On purpose?

A. On purpose, because there are -- as I said earlier, there are acts that I would call anticompetitive that are nonetheless not antitrust 10:44

certification is is to describe the method that would provide an answer to the question. The answer may well be there was a zero effect.

So I can't sit here and say the conclusion that will be reached from that will be that the plaintiffs are correct. 11:23

All I can say is here's how you would resolve that issue, and the plaintiffs will take their shot at showing there was an effect. Your economists will take their shot at showing there was no effect, and then that will be resolved in court. 11:23

But the -- both sides will be using methods of common proof. And these are market impacts of the -- if any -- of the decision not to go with FairPlay in the way Apple did it. 11:24

BY MR. MITTELSTAEDT:

Q. Do you agree that in the but-for world, the world without the alleged anticompetitive act, Apple could still have some market power for iPods? 11:24

A. I think they almost certainly would have some market power in the world for -- market for iPods. There's no way that I believe their market share is going to go drop down into single digits 11:24

or anything like that. I would expect that Apple would have a significant market.

Q. Significant market power?

A. Yeah, sure --

THE REPORTER: I'm sorry. He talked on top of you.

MR. MITTELSTAEDT: Well --

THE WITNESS: He -- He interrupted me.

MR. MITTELSTAEDT: You said "significant." I said "significant market" power. And he said "sure."

THE WITNESS: This -- when I get two people interrupting me, it's more than twice as bad. So let's start over with where I was.

BY MR. MITTELSTAEDT:

Q. You said you would expect that Apple would have significant market.

A. And then you interrupted.

Q. And said do you mean significant market power? 11:25

A. Yeah. That's what the interruption was.

Okay. I believe that it's very possible, but I don't know for certain, that Apple would have substantial market power in the market for portable digital media players regardless. 11:25

differential ease of access to the iTunes Music Store for these competing MP3 players; correct?

A. Well, that's one feature. But another feature would have been suppose that Apple had licensed FairPlay to SanDisk which is a really high quality product. All right. If you read ratings of portable digital media players, SanDisk is very high. 11:28

The additional benefit would have been the people who buy SanDisk would have a qualitatively superior experience to the already good experience they have with SanDisk. 11:28

Q. The way you're going to determine or try to determine whether there is any impact of what you call a tie on the price of iPods as opposed to the impact from substantial market power that you think Apple might have in the but-for world anyway, is to run some regression analyses; is that correct? 11:29

A. Well, maybe, maybe not. I can't tell you what analysis I'm going to do to get at anticompetitive impact as opposed to damages until I know what data are available. 11:29

It would be completely foolish to say here are the regressions I'm going to run independent 11:29

recordings from the major distribution companies than any of its predecessors.

Q. Okay.

A. That was its main -- the main thing that happened in 2003 is that -- this doesn't have much to do with Apple. It's that between losing the permanent injunction against Napster in February of 2002 and the introduction of Apple, and then subsequently having to spin-off MusicNet and PressPlay because they were being attacked on antitrust grounds. 12:24 12:24

Hollywood changed its mind about the role of digital downloads in the music industry. Sometime between the spring of 2002 and the fall of 2002, it changed its mind and was -- and it happened in a different sequence like BMG had already decided that it was going to do this and that's why it bought a piece of Napster and was in the process of converting Napster to a legal site when the cases took place in 2001 and 2002. 12:24 12:25

So BMG was the first, and then there were others that were much later, and what had to happen for this whole source of music to evolve as an alternative to buying CDs, was that the distribution companies had to change their mind 12:25

about what they would allow people to sell as permanent downloads on the Internet. And that took place, you know, sometime in the middle of 2002.

Q. What's your view on the -- on why the 12:25
record labels insisted on use of DRM for the legal stores?

A. Well, we have to go back to history. Right.

The label's original strategy was to take 12:25
over retailing, and they saw Digital Rights Management and the Digital Millennium Copyright Act as a means by which they had a window to control retail distribution. And, so, their
initial foray in the creation of MusicNet and 12:26
PressPlay was that digital downloads would be available only through the websites owned by the labels plus MusicNet and PressPlay. And that nobody else would basically be allowed to do it.
Now -- and with the exception of BMG. BMG didn't 12:26
subscribe to that, but everybody else did.

And, so, what had to happen was through litigation and negotiations, they had to be disabused of the notion that that could work.

Now, an essential ingredient of that 12:27

strategy was encryption because they had a number of business models that they thought they were going to be able to introduce, like they -- and you've seen it in other dimensions -- other products, but not so much as it would have been in digital downloads. 12:27

They wanted to move from selling a physical product, whether it's a file or a CD, to selling continuous access. Basically they wanted to be able to limit the number of uses of a file a consumer could have and -- without the file self-destructing. And they actually tried to implement that in video with DivX, and they originally tried to implement that with digital downloads with their own Digital Rights Management system that would be exploding files, that you would have them for a certain amount of time or a certain amount of listens and then they would self-destruct. 12:27 12:27

All right. So Digital Rights Management to Hollywood meant more than just protecting against encryption. It also meant a whole series of monitoring features that would enable you to control use. And it wasn't until 2002 they decided that wasn't going to work. 12:28 12:28

So Digital Rights Management changed its meaning between the demise of Napster in the summer of 2001 and the rise of iTMS in April of 2003. Sometime in that intervening period they changed the point of DRM to being this product management and marketing concept to being exclusively protection of intellectual property. 12:28

Q. In that context, do you view the introduction of Apple's iTunes Music Store as procompetitive? 12:29

A. Of course. I mean, I -- the introduction of a way to replace the CD with a digital download directly to a player and the ability to burn your own CDs was a huge benefit to consumers and it could have happened five years earlier. 12:29

I mean, Tower Records had done the work necessary to create such a website in 1998. They just weren't allowed to do it because of the restrictions that were put on them by the distribution companies. 12:29

Q. Do you think there is extensive competition at the systems level among Apple, Microsoft with its Zune, Microsoft with its PlaysForSure Network, Real, and others, at the systems level? 12:30

every method for estimating damages is in some fashion a competitive benchmark method. So I think it fits into the stuff I discuss.

But maybe I'm missing something, because I don't think there's anything out there that wouldn't fit into the template that I discussed in my report. 14:17

Q. Okay. Let's take a consumer who would have preferred to buy a competing MP3 player and was forced under the plaintiff's lock-in theory to buy an iPod. 14:17

A. Yes.

Q. And, so, did you consider whether that person's damage claim would be measured by the delta between the iPod price and the price of the competing player that he preferred? 14:17

A. I didn't use that as damages because that is conventionally not used as damages because it introduces an unsolvable problem which is what is the relative willingness to pay of the alternative versus the item in question at the individual level. That isn't -- to my knowledge, that's not a doable product. 14:17

The issue is -- here's -- here's the reason that if the -- if the price of an iPod 14:18

say. A com -- the fact that the market -- remember this is all about market power, number one, and, number two, about a method for estimating damages. All right.

This is what it's about. 14:33

Now, with regard to the market power part, market power -- remember, market power isn't necessarily the result of an anticompetitive act. Firms can have market power for a variety of reasons, and in a product differentiated market, 14:34 they will tend to have market power.

All right. We -- if you recall, I don't believe, and I think it would be foolish to assume that the but-for world is a perfectly competitive market. 14:34

In fact, I think it's probably the case, although I don't know this for sure, that the but-for world is one in which the leading producer of portable digital media players is Apple. So that's the problem. Right. If you have to figure 14:34 out not what the competitive price is to get at the damages question, but at the market power level, you -- it is evidence of market power defined price -- prices in excess of marginal cost. Differences in products that represent or in this case really three complementary products, quote, "work seamlessly," isn't sufficient to answer the question, because in the end it's consumers who are supposed to decide whether the seamlessness of how the products work 14:44 together is worth the price. And it's not the producer who is supposed to make that.

So the fact that Apple believes that its products are the best thing that had ever happened since salted peanuts is a basis for them to 14:45 believe that they would have been successful in all the complementary products regardless, but to insist that they be bought together, is -- has at least the potential for being anticompetitive, unless one can demonstrate there is a permanent 14:45 efficiency gain that can only be achieved through the tying.

Q. You're not suggesting that Apple insist
that in order to buy an iPod, you have to buy
music from its Music Store, are you? 14:45

A. No. That's not what it says is if you are
a person who wants -- if you are a person who
wants to buy a portable digital player for the
purpose of playing permanent digital downloads
over the Internet from iTMS, then you must buy an 14:45

iPod.

Q. Unless you want to burn and rip?

A. Well, yes. Unless you want to -- unless you want to have -- there's other things you can do to get around the encryption. 14:46

Q. Okay.

A. You can -- if you want to buy one of the hacker programs as well. Although they -- there's quality issues there and there's legality issues there. 14:46

Q. Or use DuroSport compatibility kit?

A. Yeah. I mean, that's an example. That's 30 bucks or something.

Q. Where did you find that product?

A. Searching from the Internet. 14:46

Q. Where did you search for?

A. I was looking for anything I could find on the Internet about how to get around FairPlay. And there are some hacker programs out there that I would never touch with a ten-foot pole. And -- 14:46 but there are also some real products out there, so.

Q. Okay.

A. And that was one of them.

Q. Let's go back to a couple of questions 14:46

So there are some examples of mandatory licensing of intellectual property. There are examples like terminal railroads or RFK Stadium -- Hetck versus Pro Football where they're required to share capital investment. But, they're fairly rare. I mean that, you know, the number of such cases is five to ten or something like that. 15:09

Q. Essential facility cases?

A. Well, they can -- yeah. That's -- that's the most obvious one, but there's -- it's hard to think, you know, like the settlement of the 1954 version of the AT&T case is not really an essential facilities case. 15:09

Q. Okay. So, just to take the first step here, if it turns out that -- let me strike that. Let me go back to the very first step. 15:09

You don't have any quarrel as an economist with Apple using some form of DRM for its Music Store; correct, because they were required to do that -- 15:09

A. They had no choice. That's not the issue.

Q. Okay. So the next step is whether to use a DRM that was compatible or incompatible with other music players other than the iPod, and if it turns out that it was least costly for Apple to 15:10

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Q. Okay. So the next step is whether to use a DRM that was compatible or incompatible with other music players other than the iPod, and if it turns out that it was least costly for Apple to 15:10

make a DRM that was incompatible, you don't have any trouble with that decision from a competitive standpoint; correct?

A. I wouldn't describe that as the second decision. I would describe the second decision as shall we make our own or shall we buy one. All right. And I have no quarrel with the decision to make your own. 15:10

And then the -- once you've decided to make your own, then the third decision is shall we license it or shall we keep it inhouse. In other words, shall we allow people to compete with iPods or not. 15:10

Q. Okay. And on the second step, why don't you have any quarrel with Apple's decision to make its own? 15:10

A. Because I have no basis for second-guessing that. I mean, in principle, I suppose one might be able to prove that they -- that -- that in an ex-ante before-the-facts sense, they shouldn't have attempted to make their own DRM. I, you know, without having discovery, there's no way I'm going to assert that's true. I would have to know a lot about the decisions being made inside Apple in 2001, 2002, that gave rise to 15:11 15:11

FairPlay. And I don't know, and I don't have anywhere near enough of information to second-guess that decision at this point.

Q. But why, in general, do you think a company entering a market is entitled to develop 15:11
its own software to do that rather than being forced, for example, to use Microsoft's software?

A. Because they think -- they think they can do it better. All right. And you don't want to have a rule that says even if you think you can do 15:11
it better, you never can. All right. That's not the right rule to have.

The right rule to have has got to be something different than that, because you don't want to say we're going to freeze the technology 15:12
forever, whatever it was in 2001. And you can't do anything differently than that without violating the antitrust laws. That would be stupid.

Q. Why would it be stupid? 15:12

A. Well, because it would prohibit innovation. The issue is not did you innovate or did you attempt to innovate. The issue is what did you do with it once you got it. And was there something about the decision that was affected by 15:12

A. It's how technically literate they are. How easy it is for them to switch the file format, to do the things necessary to switch the file format. Whether they have a CD burner. Not everybody has a CD burner. 15:52

So there are -- the degree to which any given person is locked in is -- just depends on a bunch of stuff.

What's necessary for the lock-in effect to matter is that, indeed, it creates a sufficiently 15:52 less elastic demand curve that there is a small but significant nontransitory increase in price arising from the lock-in effect.

Q. Is another variable in deciding whether a particular person is locked in and buys an iPod 15:52 because of the lock-in rather than a competing player that they prefer the -- the degree to which they prefer the other MP3 player, in other words, the stronger -- the weaker the preference for the other MP3 player, the less they're locked in? 15:53

A. Well, yes. Obviously, how they value the alternatives is relevant.

Q. Is it also --

A. I mean the reality is anybody who bought an iPod, if there was a lock-in effect, anybody 15:53

products because that's what it does? Is it the case that people who own SanDisks are more likely to be charged with violation of intellectual property rights than people who own iPods? Those are kinds of things you could get at to answer 16:15 whether that business justification was adequate.

Q. Let me try a question that I asked before that I didn't ask very well or at least let me just ask it.

Do you have a view on what -- as an 16:15 economist -- on what the effects on competition and innovation would be if the rule were that a company cannot introduce a new Music Store unless it works as well with competitors' digital music players as it does with that company's own player, 16:15 and here I'm talking about devices? In other words --

A. That would be a completely idiotic rule.

Q. Why?

A. Because it goes so far beyond what a tying 16:16 violation is. I mean the only issue here is can Apple do it. Nobody else is a candidate for having a dominant position or monopoly power in the Music Store business, so it's not an antitrust violation for Microsoft to have done it. It 16:16

wouldn't be an antitrust violation for RealNetworks to do it certainly wouldn't be an antitrust violation for any one of the dozen other free software media player people to do it. So the -- the rule would be ridiculous. 16:16

The only issue that arises here is something that can happen to at most one firm that either there's a dominant firm or there isn't. If there is a dominant firm, then they can engage in behavior that's anticompetitive that if engaged in 16:17 by other people would not be anticompetitive.

Q. Let's say that contrary to what you and I both believe, Microsoft's Zune player takes over the world, and Microsoft --

A. God, I hope not. 16:17

Q. -- ends up with the same what you referred to as dominant position as Apple has now.

A. Then we have Microsoft, the 173rd antitrust case against Microsoft because there's no way they are go going to do that without 16:17 fussing around.

Q. Let's keep Microsoft out because of your experience with them.

Let's say Roger Noll comes up with -- you're driving home tonight and you're thinking, 16:17

cost to Apple to thwart Real Network's hack, or whatever you want to call it?

MS. SWEENEY: Objection. Incomplete hypothetical. Asked and answered.

THE WITNESS: You have to change the wording on some of those a little bit. 16:30

But, right, if every single allegation of an anticompetitive act didn't happen then, of course, there is no anticompetitive effect.

BY MR. MITTELSTAEDT: 16:31

Q. That answer that doesn't do me much good.

A. I thought that's what you did is you gave me a list of the allegations of the anticompetitive acts and said assume none of them actually happened, right, that this was no positive proactive -- 16:31

Q. Which words do you have to change to agree with what I said?

A. Well, we --

MS. SWEENEY: Objection to form. 16:31

THE WITNESS: We discussed the microprocessor issue before which is it's not -- it's not -- the issue to me was never disabling the microprocessor, but there would be no reason to do that. 16:31

are kind of expensive so they haven't had a huge success in the market but they're there, they're out there.

Q. Let me go back to my question. The basic question is: What facts would satisfy you that Apple's conduct was not anticompetitive, and let me just list them again and stop me when you think the wording ought to be different: Number one, Apple used DRM because the labels required it? 16:36

A. We agreed to that. I don't think there's an issue there. Everybody, not only Apple, but everybody was required to use DRM initially. 16:36

Q. But that -- that's one factor that will lead you to conclude that Apple's conduct was not anticompetitive because if it were the other way, if Apple had decided let's use DRM and the labels didn't require it that would cause you some concern? 16:36

A. Maybe, maybe not. I mean that's not sufficient, all right. 16:36

Q. Okay. No. 2, Apple decided to develop its own DRM rather than using somebody else's; that's okay, right?

A. In principle that's not wrong. It depends how and how they implement it. The act of doing 16:37

A. Oh, I'm sorry. I'm sorry. It's late in the day. Explain what we're after now.

Q. You understand that the purported class includes both direct consumers and resellers like Best Buy? 17:01

A. The wholesale market?

Q. Yes.

A. Yes. Remind me what I was asked again.

Q. Do you know whether or not you can use the same regression analyses for both? 17:02

MS. SWEENEY: Both being resellers and consumers?

BY MR. MITTELSTAEDT:

Q. Yes.

A. My best guess is there's going to be two 17:02 regression analysis models because obviously the wholesale price differs from the retail price.

What I -- what I need to know is how the wholesale market actually works. I need documents about Apple's pricing policy in the wholesale 17:02 market. I need transactions data in the wholesale market and how I'll go about doing it -- doing that part of the analysis would depend on those details.

Let's take the simplest possible case, 17:02

which I doubt that it's true, but let's assume that it's true. Assume that the wholesale market looks exactly like the retail market, that there's a posted price for each model of iPod that's 30 or 40 percent below the retail price and everybody 17:03
can buy as much as they want at that posted price.

In that case, the -- a product-specific dummy variable whether the buyer was a wholesaler would be sufficient, right. But that's almost certainly not going to be true. It might be true. 17:03

But I suspect there are quantity discounts and advance purchase discounts, and, you know, special promotional discounts if you spend some money on advertising we'll pay some of it. So there's likely to be more complexity in the price 17:03
formation in the wholesale market than in the retail market in which case there will probably have to be two equations.

Q. And can you tell me anything more than -- more than what is in your report on what the 17:03
equation will look like for the wholesale --

A. Actually, if that's the case, it will look a whole lot like the one I just did which is static random access memory, static random access memory, which is a different kind of case. It's a 17:04

But, see, when you get to damages, you're not really -- you're not really concerned about the cross-elasticity of demand and the prices and quantities of all the other players, you're just focusing on the price and quantity of the product, 17:17 the referenced product. And so that makes it easier.

Q. Would you expect that Amazon.com makes more money on sales of some devices portable digital players than on the sale of other portable 17:17 digital players?

A. It would be inconceivable to me that the profitability of every single product on Amazon.com is the same.

Q. But for this type of product? 17:17

A. That's what I meant.

Q. For portable digital players?

A. For portable digital players, I would be very surprised if the profitability of every single player is identically the same for 17:17 Amazon.com.

Q. Would you expect significant differences?

A. What do you mean by "significant"? In a statistical sense? Or in a magnitude sense?

Q. Magnitude. 17:17

A. I don't really know. Part of it would have to do with volume versus margin, you know. So, there's costs associated with selling stuff from the standpoint of Amazon.com that go beyond just the wholesale cost of a device so I don't know what to expect. 17:18

I don't know enough about Amazon.com's pricing policies or cost structure to know whether they do have big price differences across these products. 17:18

Q. Do you know what a playlist is?

A. I think I know what a playlist is.

Q. What do you think it is?

A. It's a list of things you play.

Q. In the context of Apple's Music Store. 17:18

A. Yeah. I think it is the things that you have access to, but I'm not certain what you mean. So, let's -- maybe you can define it for me.

Q. Let me ask you two final questions. You say at page 28, and let me just read it to you. 17:18 If you want to see it, that's fine.

"If a large fraction of consumers purchase all products from the same vendor, economic analysis can determine whether the cause is tying or bundling rather than a true preference for an 17:19

STATE OF CALIFORNIA)
) ss.
COUNTY OF ALAMEDA)

I, EARLY LANGLEY, a Shorthand Reporter, State of California, do hereby certify:

That ROGER G. NOLL, in the foregoing deposition named, was present and by me sworn as a witness in the above-entitled action at the time and place therein specified;

That said deposition was taken before me at said time and place, and was taken down in shorthand by me, a Certified Shorthand Reporter of the State of California, and was thereafter transcribed into typewriting, and that the foregoing transcript constitutes a full, true and correct report of said deposition and of the proceedings that took place;

IN WITNESS WHEREOF, I have hereunder subscribed my hand this 24th day of September 2008.

Early Langley

EARLY LANGLEY, CSR NO. 3537
State of California